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Evasion of the international law of state responsibility? The ECtHR's jurisprudence on positive and preventive obligations under Article 3

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ABSTRACT

While it is evident that the ECtHR's main task is applying the ECHR, it is debatable whether the Court has adequate regard to general international law when considering questions left open by the ECHR. We contribute to this debate from a normative perspective. We discuss the criticism that the Court unduly evades the ARSIWA by applying an expansive positive obligations doctrine. We submit that the Court's propensity to focus on preventive obligations is justified in substance, since it is difficult to imagine how human rights could be *effectively* protected without such positive obligations in a world where state, third state and private actors mingle. In this sense, the Court's jurisprudence makes valuable contributions to the adaptation of the international legal system to changing societies. Criticism should focus less on the Court's inclination toward positive obligations than on its pertinent methodology, which is at times less than convincing.

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1. Introduction

The European Court of Human Rights (the 'Court') has produced an extensive, fine-grained and sophisticated jurisprudence, which covers diverse issues such as the right to life, procedural guarantees and discriminatory practices.[1] By doing so, the Court has formed a distinct legal system,[2] often referred to as 'Convention law'. Yet, the Court's practice of establishing a distinct legal system has been criticised from time to time on the ground that the Court has ignored doctrines, principles and rules of general international law[3] to which it is bound. It is true that, in view of the magnitude of Convention law, it is quickly forgotten that the Convention, as an international treaty, is part of the larger order of general international law. As such, it is built upon and part of the framework of general international law. Simply put, this means that the Court must have regard to and apply general international law. To be sure, it is beyond question that the Court's main mandate, by force of general international law, consists in applying the Convention as the primarily relevant source of law.[4] However, the extent to which the Court is bound to other – more general – sources of international law is less clear.[5]

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In particular, it is debatable whether the Court has taken adequate regard of, or rather unduly evaded, general international law when considering questions left open by the Convention and its Protocols. This article contributes to this debate from a normative perspective. In response to James Crawford and Amelia Keene,[6] we discuss whether the Court's jurisprudence on positive and preventive obligations under Article 3 of the Convention unduly evades the pertinent rules of general international law on state responsibility. We argue that the criticised jurisprudence of the Court can largely be justified in substance on the basis of the Court's role as a protector of human rights. To start, in section 2, we shall make some preliminary remarks on the normative question concerning the applicability of general international law of state responsibility to human rights regimes.[7] We also explain why positive obligations to protect human rights are especially interesting from the perspective of state responsibility. For reasons of space, we then make our argument with reference to only a small number of judgments concerning positive and preventive obligations under Article 3 of the Convention. In section 3, we take up Crawford and Keene's criticism of the Court's well-known *El-Masri* judgment.[8] According to Crawford and Keene,[9] the Court's approach to hold the Former Yugoslav Republic of Macedonia (FYRM; today North Macedonia) responsible for acts of another state on its territory does not conform to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[10] In section 4, again drawing on the same case-law than Crawford and Keene, we address his critique that the Court's positive obligations doctrine evades pertinent principles of the ARSIWA concerning the attribution of acts of private actors.[11] This part is thus based on exemplary judgments concerning child abuse at school.

The article concludes that the Court at times fails to apply the ARSIWA or applies them in a methodologically unconvincing manner. However, the contribution shows that, to a certain extent, the Court's jurisprudence can be defended in substance on the basis of the Court's special role as a human rights guarantor. We offer a perspective different from the one taken by some general international law scholars who criticised the Court's judgments that are discussed in this article. Arguing with the Court's mandate to protect human rights, we present a defence of its controversial preventive obligations doctrine.

2. International law on state responsibility and human rights

2.1. General remarks

We believe that there are good reasons to debate the relationship between human rights regimes and general international law.[12] Investigating this complex issue in its full breadth is, of course, beyond the scope of this article. We limit our attention to a discussion of selected judgments of the Court on positive and preventive obligations under Article 3 in light of the rules on attribution and on assistance to another state's commission of an internationally wrongful act contained in the ARSIWA.[13] Certain peculiarities of the Convention system (and human rights regimes in general) must be borne in mind when assessing the practice of the Court in light of general international law and the ARISWA in particular: unlike most traditional treaties, the Convention is not founded on reciprocity[14] but constitutes an objective legal order.[15] Not reciprocity guarantees compliance with such 'law-making' treaty[16] regimes, but individual complaint mechanisms.[17] Human rights abuse may hardly be retaliated by violating others' human rights.[18] There

are thus few reasons to control states' countermeasures in responding to human rights violations[19] through a general framework of state responsibility.[20] Neither does the Convention system depend on external rules – if available at all – as regards questions concerning compensation[21] and the execution of the Court's violation judgments. The Convention itself addresses both[22] and the Council of Europe established a sophisticated institutional set-up for the implementation of the Court's judgments.[23]

All of this is not to say that the ARSIWA in its entirety would be inapplicable or of no added value to the Convention system or other human rights regimes. We merely suggest that such peculiarities must not be neglected in discussions about the relationship between a given treaty regime and general international law. Against this background, we put into perspective the criticism according to which the Court's jurisprudence on positive and preventive obligations under Article 3 of the Convention dilutes or evades the rules on attribution and assistance to another state's internationally wrongful act contained in the ARSIWA.[24]

2.2. Positive obligations to protect human rights and the ARSIWA

Positive obligations to protect human rights are especially interesting from the perspective of state responsibility because, as has been critically pointed out,[25] they allow the Court to leave unanswered difficult questions of attribution of harmful acts. Contrary to negative obligations which prohibit harmful acts, thus requiring the duty-bearing state to abstain, positive obligations require positive acts from that state.[26] Positive obligations of a preventive nature are aimed at the prevention of situations, such as human rights violations.[27] Breaches of negative obligations, obligations of result,[28] are relatively easy to identify: it suffices to establish that state action directly caused prohibited harm.[29] Difficulties may arise if the actor was not a *de jure* state organ but another actor, whose action may be attributable to a state. Articles 4–11 of the ARSIWA provide answers to the question when conduct is to be considered state conduct.[30] Breaches of positive obligations, which may be either obligations of result or obligations of conduct,[31] take the form of unlawful omissions: some action that is required by international law was not done.[32] Contrary to acts, which exist as factual incidents, omissions do not materialise and are thus difficult to identify.[33] The existence of an omission depends on the identification of an abstract legal obligation that would have required undertaking a certain action.[34] In human rights practice, abstract positive obligations are often quite unspecific, i.e. expressed in wide and vague in terms.[35] Duties to protect are often formulated along the lines of 'Article … requires states to take reasonable measures to ensure that individuals under their jurisdiction are not subjected to … '.[36] It remains quite open and context-dependent whose abstention from what action (i.e. which authority should have done what) constitutes an internationally wrongful act by omission. This leaves human rights courts with considerable latitude,[37] which enables them to largely pre-empt questions of attribution by interpreting and specifying the pertinent positive obligation with hindsight to the effect that a *de jure* state organ would have been obliged to take measures that were in fact not taken. In cases where active and omissive conduct co-exist,[38] this allows human rights courts to leave questions of attribution of harmful acts open: if a court chooses to establish state responsibility on the basis of a positive obligation according to which a *de jure*

state organ unlawfully omitted preventive action, it may leave the question open whether the act that directly caused the harm is attributable to the state.[39] The state is responsible for the human rights violation anyways.[40]

The case-law criticised by Crawford and Keene, and others and in part discussed below shows that this is not a mere theoretical possibility. In certain cases, the Court overlooked the question whether the act that directly caused the impugned harm was attributable to the respondent state. Instead, the Court held the respondent state responsible on the basis of positive obligations, arguing that a *de jure* state organ would have been obliged to adopt certain preventive measures that this organ had in fact not taken. Such judgments evoke the impression that the Court sometimes prefers solving cases on the basis of relatively vague positive obligations over dealing with questions of attribution of acts. It is based on such case-law that critics accuse the Court of evading the law on state responsibility under the ARSIWA.

We will defend the Court, to a certain extent, on two grounds. On the one hand, we argue with the mandate of the Court. It is the Court's central task to *effectively*[41] protect human rights in the light of present-day conditions[42] by interpreting and applying the Convention to that effect, even if this requires interpreting the Convention so as to contain positive obligations.[43] This normative proposition follows from the object and purpose of the Convention.[44] On the other hand, we argue with the technical distinction between primary rules of international law, i.e. state obligations which are, amongst others, enshrined in the Convention, and secondary rules of state responsibility contained in the ARSIWA.[45] The secondary rules of the ARSIWA are agnostic as to the content of the states' obligations under Convention law.[46] That is, the ARSIWA constrain the Court in no way in its interpretation and application of the Convention rights and the corresponding negative and positive obligations of the Convention states. Therefore, if the Court imposes (even far-reaching) positive obligations on the Convention states with the effect of making otherwise difficult questions of attribution to some extent negligible, this may be criticised on several grounds, but not as being tantamount to evading the ARSIWA.

3. Duty to protect and third state responsibility in *El-Masri*

Though *El-Masri* raised many problems, we concentrate on how the Court answered two questions relating to third state conduct in order to then analyse the Court's approach under the *prima facie* pertinent Article 16 of the ARSIWA.[47]

3.1. The Court's approach to third state responsibility

First, the Court had to decide whether the FYRM could be held responsible for the applicant's ill-treatment at the hands of CIA agents at Skopje Airport, where he was forcefully prepared for the subsequent secret rendition flight.[48] In its own words, the Court had to 'assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is *imputable* to the respondent State'.[49] As a general rule, the Court had previously stated in vague terms: 'Article [3] requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture'[50] and that '[t]he State's responsibility may therefore be engaged where the

authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known'.[51] The Court concluded that it must regard the FYRM 'as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'[52] because the impugned acts occurred on its territory and in the presence of its authorities.[53]

Second, the Court had to decide on the FYRM's responsibility for the applicant's detention in a US dark prison in Kabul, Afghanistan. The Court

> reiterate[d] that Article 5 of the Convention lays down an obligation on the State not only to refrain from active infringements of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction.[54]

The Court observed that officials of the FYRM 'actively facilitated [the applicant's] subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer'.[55] As a result, the Court held that the FYRM's responsibility was engaged in respect of the detention of the applicant in the US dark prison in Kabul.[56]

In effect, and even if it did not clearly say so,[57] the Court thus seems to have attributed to the FYRM both the ill-treatment at Skopje Airport and the detention of the applicant at the hands of the CIA.[58] Was this in conformity with general international law on state responsibility?

3.2. Incompatibility with Article 16 of the ARSIWA

While the *El-Masri* judgment mentions the ARSIWA (namely Articles 7 and 14–16) in its 'Relevant International Law' section, it does not reference them again later. Instead, when dealing with the attribution of the CIA's acts to the FYRM, the Court referred to *Ilaşcu and Others* v. *Moldova and Russia*,[59] a case which concerned the attribution of acts of non-state actors to Convention states.[60] This cross-reference is misleading, though:[61] broadly speaking, the *Ilaşcu* situation (i.e. attribution of acts to a state, resulting in independent state responsibility) is governed by Articles 4–11 of the ARSIWA,[62] whereas Article 16 ARSIWA would apply to the *El-Masri* situation *in abstracto* (i.e. aiding or assisting another state in the commission of an internationally wrongful act, leading to derived state responsibility).[63] Despite this deceptive reference to *Ilaşcu and Others* v. *Moldova and Russia*, the Court's *El-Masri* judgment then seemingly relied on a rationale similar to the one underlying Article 16 of the ARSIWA. However, the Court neither explicitly nor implicitly based its findings on this provision[64] – and for good reasons, Article 16 would not have applied *in casu*:[65]

For a start, the Court implicitly admitted that it was not competent to adjudge the US's actions.[66] Hence, the Court could not determine whether the FYRM assisted in an internationally wrongful act *per se,* as would have been required by Article 16 ARSIWA.[67] Furthermore, Article 16 would have required that the FYRM *intended* to facilitate such an international wrong by US authorities.[68] Yet the Court, for its part, was satisfied that the FYRM '*ought to have known,* at the relevant time, that there was a real risk that the applicant would be subjected to treatment contrary to Article 3'[69] and 'ought to have been aware' of the transfer into secret detention.[70] This is not tantamount to having

established intent to facilitate the impugned harm.[71] Article 16 ARSIWA further requires that 'the internationally wrongful conduct is *actually committed* by the aided or assisted State'.[72] By contrast, the Court's jurisprudence on removal contrary to Article 3 of the Convention does not require that the feared harm actually occurred, but only demands substantial grounds for believing that the person in question would face a real *risk* of being subjected to ill-treatment.[73] Dealing with the applicant's detention in Kabul, the Court applied the same standard to Article 5.[74] In addition, the Court held the FYRM responsible for the applicant's ill-treatment and his subsequent detention[75] – unlike under Article 16 ARSIWA, which limits the assisting state's responsibility to the wrongdoing that its own conduct has caused or contributed to.[76] With regard to this last point, it could, however, be argued in favour of the Court that the FYRM's assistance was necessary for the US's actions with the result that the resulting injury would be concurrently attributed to the FYRM and the US.[77]

In sum, we agree with Crawford and Keene that Article 16 ARSIWA would not have provided a legal basis for holding the FYRM responsible for injury resulting from the impugned US acts.[78] Nonetheless, the Court did so. By holding the FYRM responsible not merely for its assistance to the US but for the US's conduct, the Court, moreover, seems to have exceeded the legal consequences foreseen by Article 16 ARSIWA: it seemingly attributed the US acts wholesale to the FYRM.

3.3. Violation of the duty to protect as conduct of state organs

The observation that the Court's methodological approach to holding the FYRM responsible for violations of the applicant's substantive rights by US agents is not in conformity with the rules of general international law on derived state responsibility raises questions about other – more legally sound – ways to hold the FYRM responsible. This enquiry naturally leads to an assessment of the conduct of *de jure* state organs of the FYRM, which is clearly attributable to the state under Article 4 of the ARSIWA. As the commentary to the ARSIWA says, there are numerous substantive (primary) rules that either prohibit a state to aid or assist another state in the commission of certain internationally wrongful acts or even require a state to prevent such acts.[79]

On the basis of such primary rules, the Court held the FYRM liable for its detention of the applicant in a Skopje hotel[80] and its transfer of the applicant to US agents.[81] Both is in conformity with the Court's long-standing *Soering* jurisprudence[82] and closely aligned with Article 3 of the U.N. Convention against Torture.[83] The Court also applies such independent state responsibility[84] on the basis of primary rules of Convention law in cases that involve two Convention states. For instance, in *Shamayev and Others* v. *Georgia and Russia*, the Court held that Georgia would violate Article 3 of the Convention if it extradited the applicant to Russia because it could not be excluded that the applicant would be ill-treated by Russian authorities.[85] The Court therefore rightly held the FYRM responsible for its detention of the applicant in a Skopje hotel and its handing over of the applicant to US agents. Yet, on this basis, the FYRM can only be held responsible for harmful conduct of its state organs.

Why did the Court not stop here, but impute the CIA's brutal practices to the FYRM, despite the lack of a legal basis in the law of state responsibility? The answer seems rather clear with regard to the applicant's ill-treatment at Skopje Airport: the Court did not want

to leave unpunished a Convention state that was literally watching US special agents torture and abduct innocent individuals on its territory. This becomes evident where the judgment reads: 'the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible'.[86] Legally, the Court's reasoning is doubtful, however. Jurisdiction, on the one hand, and attribution and state responsibility, on the other, are distinct questions.[87] One is left with the impression that the Court takes its mandate to effectively protect human rights in Europe seriously by going far, sometimes too far, to hold a state responsible[88] if Convention rights are with its acquiescence violated on its territory. This explanation of the Court's practice is confirmed by the Court's judgment in *Sargsyan* v. *Azerbaijan*. This case concerned Armenian refugees, who were displaced during the Nagorno-Karabakh conflict and have been denied return and access to their property. The Court reasoned with 'the *need to avoid a vacuum in Convention protection*'[89] in order to hold that Azerbaijan had 'full responsibility under the Convention' due to its 'jurisdiction as the territorial state'.[90] Azerbaijan's jurisdiction was presumed, although the Court recognised that the Azerbaijani authorities 'may encounter difficulties at a practical level in exercising their authority' in the area in question,[91] which is in effect no man's land between the frontlines.[92] Without further distinguishing between jurisdiction and state responsibility,[93] the Court applied positive obligations to hold Azerbaijan directly responsible for the violation of several Convention rights.[94] Could the Court's use of positive obligations in this case elucidate its decision to hold the FYRM responsible for the applicant's ill-treatment at Skopje Airport at the hands of CIA agents?

In view of the positive obligation of states under Article 3 of the Convention to protect individuals under their jurisdiction from torture, the Court's decision to hold the FYRM to account for the applicant's ill-treatment at Skopje Airport seems indeed justifiable, irrespective of whether the perpetrators were private or state actors.[95] This is, moreover, in line with the U.N. Human Rights Committee's view in *Alzery* v. *Sweden,* which, referring to Article 1 of the U.N. Convention against Torture, reads in the relevant parts: 'at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party'.[96] We therefore submit that the Court's *El-Masri* judgment should not be read as attributing the applicant's ill-treatment by US agents at Skopje Airport to the FYRM. Instead, the judgment should be understood to the effect that the Court found the FYRM directly responsible for breaching its positive obligation to protect individuals under its jurisdiction from torture.[97] At issue was a breach of a primary obligation by the FYRM itself, not the attribution of CIA acts to the FYRM on grounds of secondary rules of state responsibility. Admittedly, however, the Court's reasoning and language is neither entirely clear nor coherent.[98]

3.4. Unclear basis for the attribution of the applicant's secret detention

The situation appears different with respect to the Court's finding under Article 5 of the Convention concerning the FYRM's responsibility for the applicant's secret detention in Kabul. Here it is unclear which state duty was violated besides the FYRM's positive obligation to protect the applicant by not transferring him to US officials due to the substantial human rights risks concomitant with this transfer. The Court's judgment leaves this

question open. This seems to imply that the Court indeed attributes the applicant's four-month detention in Kabul to the FYRM.[99] The judgment does not explicitly say so, however;[100] neither does it elucidate the reasons or the legal basis for such an attribution.[101] The Court simply justifies its finding with the FYRM's active facilitation of the applicant's detention and the ensuing human rights risks.[102] André Nollkaemper thus aptly criticised the Court for not clarifying how this charge differs from the violation that resulted from the applicant's initial transfer to US custody.[103]

3.5. Summing-up

According to James Crawford and Amelia Keene, the Court is 'broadening … the rules on the responsibility of a third state for violations carried out on its territory but not by it' and 'develop[ing] its own jurisprudence on State responsibility for conspiracy, or "connivance", in a way which has no basis in the ARSIWA'.[104] He likened this to 'expanding the substantive obligations of the ECHR to avoid engaging with the ARSIWA'.[105] The foregoing analysis leads, in part, to a different result: the Court's conclusion that the FYRM violated Article 3 in the context of the applicant's ill-treatment at Skopje Airport is to be understood as a finding of a breach of a state duty to protect[106] which is generally recognised in international human rights law.[107] This reading of *El-Masri* is supported by a passage in the related *Al Nashiri* judgment where the Court held that 'Poland was required to take measures designed to ensure that individuals within its jurisdiction were not subjected to torture'.[108]

The situation is, admittedly, different with regard to the Court's finding on Article 5 of the Convention. This part of the judgment can be criticised for its lack of clarity concerning the basis on which the FYRM was held responsible for the applicant's detention in the US dark prison in Kabul. It must be emphasised, though, that the Court seems to have moved away from this jurisprudence. In *Al Nashiri,* Poland was held responsible for enabling the US authorities to transfer the applicant to Morocco only, and not for his subsequent detention in Rabat.[109] In *El-Masri*, the Court seems to have overreached in its – in principle laudable – efforts to avoid vacuums of human rights protection in Europe when it held the FYRM responsible for what happened in Kabul. After all, the Court would obviously not even have had jurisdiction with regard to the applicant's detention in Afghanistan.[110]

4. Attribution and positive obligations under Article 3

As *El-Masri* shows, the Court is walking a tightrope between the application of recognised positive obligations to protect, on the one side, and inadequate attribution of conduct, on the other. This has led to the critique that the Court confounds attribution and positive obligations.[111]

4.1. Untangling criticism of the Court's positive obligations doctrine

4.1.1. No primacy of negative obligations

We argue that those miss the point who criticise the Court for drawing on positive obligations instead of dealing with questions of attribution that arise from harmful actions by

actors other than *de jure* state organs. This needs some explanation.[112] Imagine a case concerning a private school teacher who whipped a pupil in a manner amounting to ill-treatment under Convention law. Roughly speaking,[113] the Court can focus on two issues: on the action that directly caused the alleged harm (i.e. the whipping) or on some omission that made the harmful action possible or more likely (i.e. the lack of some preventive measure against whipping). The first issue requires the Court to deal with the question, governed by the ARSIWA, whether the whipping can be attributed to the state. If the Court examines the second issue this is different insofar as it is not factually clear who omitted. Contrary to acts, omissions cannot be traced back to a certain actor. Omissions presuppose duties to act, which are assigned based on normative criteria and often only loosely defined in the abstract. The resulting latitude allows the Court to not deal with the conduct of private or parastatal actors but to concentrate on whether *de jure* state organs bore and omitted a duty under Convention law to take effective preventive measures. By doing so, the Court may find a state responsible for the harm suffered by the pupil irrespective of whether the whipping is attributable to the state. This is legally unproblematic because negative and positive state duties as well as active and omissive state conduct may co-exist and co-apply.[114] The ARSIWA have nothing to say on how the Court must approach such a case. Breaches of primary obligations are exclusively governed by Convention law. It is thus perfectly compatible with the ARSIWA if the Court finds a state in breach of a positive obligation without dealing with a possible breach of a negative obligation (and the accessory question of attribution).[115] Also, there is no rule according to which the Court would have to prioritise negative over positive obligations.[116]

Those who criticise the Court for expanding positive obligations in order to evade questions of attribution, however, suggest that negative obligations should be treated as a priority to positive obligations. Otherwise, the Court's practice would not be objectionable given that – as explained – the ARSIWA do not compel the Court to apply or prioritise negative obligations. This conception would mean that the Court should follow a sequential approach. First, it would have to examine whether injurious acts are, according to the ARSIWA, attributable to the respondent state.[117] If they are, the state is considered as having actively interfered with the applicant's rights and, thus, as having violated its negative obligation, e.g. under Article 3 of the Convention. Conversely, if the injurious act cannot be attributed to the state, the Court could in a second step examine whether the state omitted to comply with a positive duty that required the state to prevent injurious acts. But, as explained, the ARSIWA is agnostic to the content of primary rules and, as a consequence, also to the question how negative and positive obligations interrelate under Convention law.

Besides this technical argument based on the distinction between the secondary rules of the ARSIWA and the primary rules of Convention law, we believe that it is also normatively wrong to suggest that the Court should, as a rule, primarily focus on negative obligations. It is the Court's mandate, as it emerges from the object and purpose of the Convention, to effectively protect human rights. This may require the Court to focus on positive obligations; namely, in cases where a focus on omissive state conduct is better suited to grasp the main human rights problem. We come back to this below.

For the above reasons, we submit that the criticism against the Court's positive obligations jurisprudence under Article 3 is, albeit not entirely misplaced, framed wrongly.

If the Court's substantive positive obligations jurisprudence is to be critically assessed, this cannot be done on the basis of the ARSIWA. Rather, it must be asked if the Court's interpretation and application of positive obligations under Article 3 is too expansive in light of general international human rights law and/or if it lacks the necessary methodological rigour.

4.1.2. Re-focusing on the Court's methodology

We assume that those who take issue with the Court's approach of sometimes focusing on positive obligations do not mean to say that a Convention violation entailing state responsibility is excluded if the injurious act cannot be attributed to the state; that is, when no breach of a negative state duty was found. State responsibility, as explained, may equally be engaged by the failure to comply with positive obligations.[118] An omission complained of is often clearly attributable to the state,[119] notably where an applicant invokes the omission of genuine state functions such as to legislate,[120] to investigate and prosecute or to take preventive security measures to maintain public safety and order.

Therefore, the Court's propensity to focus, in certain constellations, on the failure to comply with positive obligations rather than on the attribution of injurious acts is not problematic as such. Three questions, all predominantly governed by primary rules, must be asked to assess the Court's practice: (1) Does the alleged positive obligation exist under Convention law and is it permissible under general international human rights law? (2) Did the state indeed omit its obligation? (3) Is the omission sufficient for finding a Convention violation under the applicable test concerning the causation between omission and harm?[121] The Court's focus on positive obligations in a given judgment can only be said to be improper either if the Court answers at least one of these questions in a manner incompatible with general international law, or else if the Court's assessment of the case is methodologically tainted.

This leads to the observation that the debate presumably concerning the perceived obliteration of attribution and positive obligations actually concerns rather the Court's positive obligations doctrine than the Court's dealings with attribution. By reference to two Article 3 judgments that James Crawford and Amelia Keene criticised,[122] the following section examines, by way of examples, whether the Court's positive obligations doctrine is unduly expansive or lacks the necessary methodological rigour.

4.1.3. Positive obligations under Article 3 in light of general international human rights law

The first question to be addressed is whether the Court creates positive obligations under Article 3 that go too far in light of general international human rights law. This, we would argue, cannot be claimed easily. In *Costello-Roberts* v. *UK,* a case dealing with moderate corporal punishment of a pupil, the Government accepted its obligation to legislate in a general sense. It argued, however, that it had fulfilled its duty by outlawing all but moderate forms of corporal punishment.[123] Whether this was sufficient under Convention law was clearly a question to be answered by the Court, though. The Court challenged the respondent state's view,[124] referring to the U.N. Convention on the Rights of the Child.[125] The U.N. Convention establishes, in Article 28, a state duty to 'take appropriate measures to ensure that school discipline is administered in a manner consistent with the child's dignity and in conformity with the present Convention'. Today, it seems that the

Court's approach – to require legislation that prohibits all forms of corporal punishment – would be at least defensible in view of the quoted Article 28 and the relevant General Comment No. 8.[126] In 1993, *Costello-Roberts* was perhaps ahead of its time. Yet it must not be forgotten that the 'existence and development of international law depends on the application, reinforcement and enforcement of international law' through bodies of its special regimes.[127] It would be wrong to assume that the Court may only follow suit after the Human Rights Committee or the International Court of Justice (which undeniably play important roles in the international legal system) have taken a step in developing an international rule.[128]

In *O'Keeffe* v. *Ireland*,[129] which dealt with 20 sexual assaults on a nine-year old pupil by a Diocese schoolteacher, the Court examined Ireland's positive obligation to take legislative measures to ensure that individuals under its jurisdiction are not subject to ill-treatment contrary to Article 3. It justified this obligation by pointing to its earlier jurisprudence in *X and Y* v. *the Netherlands*[130] and by arguing that only effective criminal-law provisions backed up by law-enforcement could achieve deterrence against such grave acts.[131] The Committee against Torture's relevant General Comment No. 2 also discerns a state duty 'to exercise due diligence to prevent, investigate, prosecute and punish such non-state officials or private actors' that ill-treat individuals contrary to the U.N. Convention against Torture.[132] Again, the Court's general approach seems at least defensible under general international human rights law.

4.1.4. Difficulties with assessing compliance with positive obligations

The second and third questions to be dealt with ask whether the Court erroneously or lightly concludes that a respondent state failed to comply with its positive obligation even if said obligation is far from clear, and whether the Court's assessment as to whether an omission is sufficiently linked to rights infringements to engage state responsibility lacks the necessary methodological rigour.

In *Costello-Roberts,* there was no need to address these questions at length. The Court found that the corporal punishment inflicted upon the applicant remained under the minimum level of severity required to claim a violation of Article 3.[133] The judgment's wording is, however, ambiguous where it reads 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies' and that '[a]ccordingly … the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom'.[134] This sounds as if the Court would then proceed to assessing the act of corporal punishment, yet this passage marked the end of the Court's considerations of the positive state duty to take legislative measures to secure the rights of schoolchildren. The Court could have been more precise: the present formulation leaves some room for interpretation as to whether the Court dealt with a positive state duty or with the attribution of an active interference with the applicant's rights.

In *O'Keeffe*, it remains unclear how exactly the Court reached its conclusion that Ireland failed to take the required measures to prevent the sexual assaults. According to the Court: 'the question for current purposes [was] whether the State's framework of laws, and notably its mechanisms of detection and reporting, provided effective protection for children attending a national school against the risk of sexual abuse'.[135] The Court later observed that Ireland should have been aware of the pertinent risks and failed to address

them 'through the adoption of commensurate measures'.[136] These, the judgment suggests, 'should, at a minimum, have included effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body, such procedures being fundamental … to the fulfilment of the positive protective obligation of the State'.[137] This leaves the scope and the content of Ireland's positive obligation largely unresolved. It would be commendable if the Court specified the pertinent positive obligations – at least for the purpose of a given case – in greater detail in order to carefully subsume the respondent state's relevant legal framework.[138] Because a Convention violation means responsibility for an actual impairment of someone's Convention rights, it would furthermore be most desirable if the Court adopted a rigorous test to assess the linkage between state conduct (i.e. the omission) and the result (i.e. the rights infringement). This linkage takes an important function in that it limits state responsibility for infringements of Convention rights that were not actively caused by the state. Thus, this linkage has a function similar to the role that attribution of conduct of non-state actors plays at the level of secondary obligations:[139] limiting state responsibility to the purview of the state.[140]

In *O'Keeffe*, the Court did not apply any clear methodological test to assess the link between the sexual assaults and Ireland's omission. While it makes clear that the state should have monitored the schools more closely, the Court fails to state what would have been required and, by extension, what Ireland exactly omitted.[141] The Court emphasised, though, that the applicant, who had been obliged to attend school, had no reasonable alternative other than the school where she was assaulted.[142] This indicates that the Court undertook some causality consideration. It seems to have opined that Ireland, by obliging the applicant to go to school but not providing an alternative to the school where she was assaulted and by failing to take effective preventive measures, bore some responsibility for the assaults. With regard to the last element, i.e. the failure to establish an effective protective framework, the Court argued based on foreseeability. It stated that Ireland ought to have known of the risks and the need for preventive measures.[143]

This reminds the reader of *El-Masri*, where the Court argued that the applicant's secret detention was foreseeable and that the FYRM laid the ground for the later US acts.[144] The fundamental idea appears to be that a state has violated its duty to protect: if, first, the human rights violation complained of was or should have been foreseeable; and, second, if the omitted measures had or might have prevented the violation. Yet a systematically applied, methodologically sound test seems to be absent.[145] As Stoyanova observes concerning the proximity (causality) between the harm and the state omission: 'the Court uses different expressions in order to refer to the causation between the harm and any omissions … the Court has not developed anything close to a consistent terminology … uncertainty pervades the case law'.[146] This is problematic since it negatively affects the comprehensibility and persuasiveness of the Court's reasoning.

4.1.5. Effective human rights protection: focus on systemic problems

Given these difficulties with defining the scope and content of positive obligations and establishing the causal link between an omission and rights infringements, one could argue that the Court would better focus on negative obligations – even if that requires dealing with questions of attribution. Establishing an active interference with Article 3 is normally much easier than assessing whether the failure to comply with a positive obligation led to a Convention violation. Likewise, it is easier to define injurious acts to refrain

from than to define preventive measures to adopt. However, attributing active interferences of non-state actors to the state may raise complicated problems too. Apart from such practical concerns, other highly important issues need to be considered as far as the focus on negative or positive obligations is concerned.

Against the background of the cases discussed, one such consideration quite naturally comes to mind: namely, that, in certain cases, positive obligations capture the main human rights problem much better than a focus on active interferences.[147] Insisting on the duty to protect may be much more effective. This might explain the Court's approach. For it is, after all, the Court's main purpose to effectively protect human rights. Ideally, however, the Court would not focus on positive obligations to neglect negative obligations, but in order to fully assess the active and omissive conduct attributable to a state.[148]

In *O'Keeffe* and *Costello-Roberts*, teachers at independent schools interfered with the physical integrity of pupils who were required by law to attend school. Moreover, the pupils' parents were, in the former case, not given any real choice between different institutions[149] and, in the latter case, not adequately informed of the private school's use of corporal punishment contrary to state school practice.[150] In cases like these, focusing on negative obligations means dealing with the act of an individual who is at best at the periphery of the respondent state. Whether the individual's act can be attributed to the state under the ARSIWA does not change much. Does the establishment of a formal attributive relationship to the state in order to make the fictitious claim that the state itself actively interfered with the applicant's integrity really matter? Is not the question as to the state's positive obligations much more important for the purpose of fine-tuning domestic human rights systems and thus ensuring effective protection of human rights throughout Europe?[151] It is a fiction to believe that the state is a unitary entity that violated someone's Convention rights either by acting or omitting. It is perfectly possible that a state teacher actively interfered and that, at the same time, central state organs omitted to take adequate preventive measures. If that is so, one may wonder if it would be appropriate for an international human rights court to focus more closely on the fallible individual than on the sloppy state system.[152]

Considering *O'Keeffe* again, the main problem was, in any case, not the individual, criminal act of the teacher, whatever his status.[153] What was crucial was the malfunction of the state – the failure of high-level authorities. They were, or ought to have been, aware of the problem of sexual abuse.[154] But they neither abandoned the system of entrusting obligatory primary school education to denominational institutions nor put in place effective control mechanisms.[155] From the perspective of a human rights court, what must follow is clear. To effectively protect human rights, the Court must focus on the more general problem: the omitted state duty to generally protect schoolchildren from sexual abuse by means of reasonably effective measures. Tellingly, the Court's approach is fully supported by the opinion on positive obligations adopted by the Human Rights Committee.[156]

Furthermore, it must not be forgotten what might happen if human rights courts took a very cautious approach to positive obligations. Should human rights courts principally refrain from imposing preventive obligations on states, state duties could be evaded relatively easily by merely outsourcing public interests far enough to break any chain of formal attribution. Private schools, private prisons, private security forces, private debt collectors and private health care providers already exist.[157] It is difficult to believe that it would be in

conformity with the object and purpose of the Convention, or indeed any human rights treaty, if the Court would turn a blind eye to such institutions' human rights records.[158]

4.2. Summing-up

To be sure, the Court does often not examine whether acts committed by non-state actors can be attributed to the state under the ARSIWA. The Court, when referring to attribution, certainly often fails to apply the ARSIWA, or does not apply them rigorously. And, no doubt, the Court is not always entirely clear as to whether it is dealing with attribution or positive obligations.

In our view it is defensible, however, for an international human rights court to focus on positive obligations if it is evident that this is where the crucial, systemic deficit lies. This is in line with the idea of fine-tuning the domestic human rights systems of Convention states. Moreover, it is consistent with the Human Rights Committee's view. Most importantly, it corresponds with the Court's main responsibility, which is to effectively protect human rights in Europe.

Nevertheless, the Court's pertinent case-law is weak on methodology.[159] Occasionally, its language is ambiguous. The scope of positive obligations under the Convention is at times hardly discernible, and the Court does perhaps not always delineate positive obligations in line with standards under general international human rights law. Finally, the Court's jurisprudence could be improved in terms of introducing a clear and consistently applied test to examine whether an omission resulted in a Convention violation. All this leads, now and then, to judgments that are difficult to reconcile with the relevant doctrines of general international law. These doctrines may, as a consequence, be negatively impaired or – put another way – diluted.[160]

5. Conclusion

We propose the following answer to the question posed in this article's title: with regard to the issues addressed here, the Court's focus on positive obligations can be justified in substance. Methodological imperfections – albeit unavoidable – are, however, not justified: they are regretful not only because they are capable of diluting doctrines of general international law, but also because a lack of methodological rigour may, in the long term, damage the Court's own authority.

With regard to the Court's positive obligations jurisprudence, three important considerations must be borne in mind: first, Convention law is a special regime containing primary obligations that must not necessarily be identical to those under another treaty regime or customary international law. For the present purpose, this means primarily that it is the responsibility of the Court, as the authoritative interpreter of the Convention, to construe the Convention guarantees in their negative and positive facets. In particular, the ARSIWA, as a non-legislative codification of secondary rules on state responsibility, do not pertain to this interpretative act. In short, primary and secondary rules are to be carefully distinguished. Second, the Court's relatively strong emphasis on positive obligations is justified by the heightened importance of preventive and protective duties in the human rights context. In today's complex, globalised world, where state, parastatal, non-state and, possibly, third state actors mingle, it is difficult to imagine how human rights could be

effectively protected without protective state duties. This ratio does not, however, demand an either/or approach. The Court could and should, despite a certain focus on positive obligations, also examine breaches of negative obligations, even if this means solving questions of attribution according to the ARSIWA. Third, the international legal system continues to steadily develop, and so do its legal rules. The Court's case-law contributes to this process. Therefore, while the Court's sometimes-progressive jurisprudence may, from time to time, be too far-reaching, it ultimately contributes to the continuous adaptation of the international legal system to changing societies. The other side of the coin is that the Court must be careful not to confuse doctrines of general international law by virtue of the creative power of its jurisprudence.

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Notes

1. See especially Articles 2, 5–7, 14 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols no. 11 and no. 14, 4 November 1950, 213 UNTS 221, CETS no. 005, ratified by 47 states, entered into force 3 September 1953.
2. See, seminally, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi)*, 13 April 2006, U.N. Doc. A/CN.4/L.682.
3. The term 'general international law' hereinafter refers to those public international law rules that do not stem from a specialised treaty regime, most notably the concepts underlying state responsibility. Cf. James Crawford, 'State Responsibility', in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, September 2006), http://opil.ouplaw.com/home/EPIL, paras 2–3.
4. See Article 38(1)(a) Statute of the International Court of Justice, 26 June 1945, 39 AJIL Supp. 215 (1945), entered into force 24 October 1945.
5. See, e.g. Melanie Fink, 'The European Court of Human Rights and State Responsibility', in *The European Court of Human Rights and Public International Law: Fragmentation or Unity?*, ed. Christina Binder and Konrad Lachmayer (Baden-Baden: Nomos and Vienna: Facultas.wuv, 2014), 93–118; Marko Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', *Human Rights Law Review* 8, no. 3 (2008): 411–48; Daniel Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*', *Nordic Journal of International Law* 79, no. 2 (2010): 245–77; Linos-Alexandre Sicilianos, 'L'Articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme', *Swiss Review of International and European Law* no. 1 (2017): 3–18.
6. James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights', in *The European Convention on Human Rights and General International Law*, ed. Anne van Aaken and Iulia Motoc (Oxford: Oxford University Press, 2018), 178–98, see, especially, 181–84 and 188–89.
7. Cf. ARSIWA, with commentaries, para. 2 on Article 55; Annie Bird, 'Third State Responsibility for Human Rights Violations', *European Journal of International Law* 21, no. 4 (2010): 883–900.
8. *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, ECHR 2012.

9. Crawford and Keene, 'Structure of State Responsibility', 189.
10. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, U.N. GAOR, 56th Sess., Supp. No. 10, at 59, para. 77, U.N. Doc. A/56/10(SUPP) (2001). The General Assembly twice took note of and commended the ARSIWA to the attention of Governments. See U.N. GA Res. 59/35, U.N. GAOR, 59th Sess., Supp. No. 49, at 482, U.N. Doc. A/59/49 (Vol. I) (2004) and U.N. GA Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 49, at 499, U.N. Doc. A/56/49 (Vol. I) (2001). Further James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013). This article proceeds on the assumption that the rules of general international law on state responsibility are codified in the ARSIWA. See Crawford, 'State Responsibility', para. 3.
11. Crawford and Keene, 'Structure of State Responsibility', 181–84.
12. Cf., e.g. *Al-Dulimi and Montana Management Inc.* v. *Switzerland* [GC], no. 5809/08, ECHR 2016, and the concurring and (partly) dissenting opinions annexed to this judgment; European Court of Justice, Judgment of 3 September 2008, *Kadi I*, C-402/05 P and C-415/05 P, EU:C:2008:461; Judgment of 18 July 2013, *Kadi II*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518; *'Mapiripán Massacre'* v. *Colombia*, 15 September 2005, IACHR Series C No. 134, (see, especially, para. 107 on state responsibility).
13. Articles 4–11 and 16 ARSIWA.
14. *Ireland* v. *the United Kingdom*, 18 January 1978, Series A no. 25, para. 239.
15. *Loizidou* v. *Turkey* (preliminary objections), 23 March 1995, Series A no. 310, para. 75.
16. *Wemhoff* v. *Germany*, 27 June 1968, Series A no. 7, para. 8.
17. See Jean-Paul Costa, 'Responsibility for Violations of Human Rights Obligations: European Mechanisms', in *The Law of International Responsibility*, ed. James Crawford, Alain Pellet and Simon Olleson (Oxford: Oxford University Press, 2010): 764–74, 764; Matthew Craven, 'For the "Common Good": Rights and Interests in the Law of State Responsibility', in *Issues of State Responsibility before International Judicial Institutions*, ed. Malgosia Fitzmaurice and Dan Sarooshi (Oxford, Portland: Hart, 2004), 105–28, 117–18; Rietiker, 'The Principle of "Effectiveness"', 254; Dinah Shelton, *Remedies in International Human Rights Law*, 3rd ed. (Oxford: Oxford University Press: 2015), 59–61.
18. See Shelton, *Remedies*, 60–61. Cf. Article 60(5) Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 UNTS 331, ratified by 114 states, entered into force 27 January 1980; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Boston: Martinus Nijhoff, 2009), MN 23–24 on Article 60.
19. The Court itself has merely received 33 inter-state applications (26 cases) since 1956. See http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf. Further, Bird, 'Third State Responsibility', 895; Craven, 'Common Good', 107; Malcolm D. Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm', in *Issues of State Responsibility before International Judicial Institutions* (see note 17), 139–60, 147 and his note 29; Shelton, *Remedies*, 60 and her note 200.
20. See ARSIWA, with commentaries, para. 2 on Part III, Chapter II; Craven, 'Common Good', 125.
21. On the Court's practice, see Maarten den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights', *Journal of International Dispute Settlement* 4, no. 2 (2013): 361–83, 378–81, who notes that general international law provides little guidance on questions concerning reparation in cases of multiple wrongdoing states.
22. Articles 41 and 46 ECHR. See also *Papamichalopoulos and Others* v. *Greece* (Article 50), 31 October 1995, Series A no. 330-B, para. 34.
23. See, e.g. Costa, 'Responsibility for Violations', 770–71; further Basak Çalı and Anne Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe', *Human Rights Law Review* 14, no. 2 (2014): 301–25.
24. See Crawford and Keene, 'Structure of State Responsibility'; Evans, 'Role and Realm'.
25. Crawford and Keene, 'Structure of State Responsibility', 181; Evans, 'Role and Realm', 157–59. Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur

Responsibility for Their Involvement in Serious International Wrongdoing?', *German Yearbook of International Law* 60, 2017: 667–07, 670, observes that international courts tend to 'avoid the issue of negligent participation by referring to positive obligations and to the failure to take action without considering the responsibility of States for their active involvement'. Maarten den Heijer, 'Shared Responsibility before the European Court of Human Rights', *Netherlands International Law Review* 60, no. 3 (2013): 411–40, 422, explains that the Court's positive obligations doctrine covers cases that would otherwise be dealt with under the rules on derived responsibility (Articles 16–18 ARSIWA).

26. See, e.g. Constantin P. Economides, 'Content of the Obligation: Obligations of Means and Obligations of Result', in *The Law of International Responsibility* (see note 17), 371–81, 373; Franck Latty, 'Actions and Omissions', in *The Law of International Responsibility* (see note 17), 355–63, 356–57; Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations', in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 562–86.
27. See Economides, 'Content of the Obligation', 371–72.
28. Ibid., 378.
29. Latty, 'Actions and Omissions', 356.
30. ARSIWA, with commentaries, para. 1 on Part I, Chapter II.
31. Economides, 'Content of the Obligation', 377–78.
32. Latty, 'Actions and Omissions', 358.
33. Ibid., 357.
34. Ibid., 361.
35. Cf. den Heijer, 'Shared Responsibility', 423; Economides, 'Content of the Obligation', 378.
36. Cf., e.g. *Mahmut Kaya* v. *Turkey*, no. 22535/93, ECHR 2000-III, para. 101 ('the authorities failed [contrary to Article 2] to take reasonable measures available to them to prevent a real and immediate risk to the life of [the applicant]'); *A.* v. *the United Kingdom*, 23 September 1998, Reports of Judgments and Decisions 1998-VI, para. 22 ('Article 1 … taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture'); *Kurt* v. *Turkey*, 25 May 1998, Reports of Judgments and Decisions 1998-III, para. 124 ('Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance'); *Damir Sibgatullin* v. *Russia*, no. 1413/05, 24 April 2012, para. 56 ('the authorities failed [contrary to Article 6] to take reasonable measures to secure their [the witnesses] attendance at the trial'); *Moreno Gómez* v. *Spain*, no. 4143/02, ECHR 2004-X, para. 55 ('a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8'); *Dink* v. *Turkey*, no. 2668/07, 14 September 2010, para. 137 ('Elle [la Cour] estime … que les Etats sont tenus de créer, tout en établissant un système efficace de protection des auteurs ou journalistes, un environnement favorable à la participation aux débats publics [Article 10]'); *Gustafsson* v. *Sweden* [GC], 25 April 1996, Reports of Judgments and Decisions 1996-II, para. 45 ('national authorities may … be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the negative right to freedom of association [Article 11]').
37. See ARSIWA, with commentaries, para. 4 on Article 2; Economides, 'Content of the Obligation', 378; Latty, 'Actions and Omissions', 361. In *Ilaşcu and Others* v. *Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, para. 334, the Court held that:

> Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case.

38. ARSIWA, with commentaries, para. 4 on Article 2; Latty, 'Actions and Omissions', 360. Not surprisingly, it has happened that the Court internally disagreed whether to examine a case from the perspective of negative or positive obligations. See, e.g. *Verein gegen Tierfabriken Schweiz (VgT)* v. *Switzerland (no. 2)* [GC], no. 32772/02, ECHR 2009, para. 78.

39. Cf., e.g. the discussion in *Bureš* v. *the Czech Republic*, no. 37679/08, 18 October 2012, paras 73–79; see also den Heijer, 'Shared Responsibility', 439.
40. This is not to say that the question whether the harmful act can be attributed to the state is legally entirely irrelevant. For instance, it may remain relevant for questions of compensation. However, the account given above suffices for the present purpose.
41. Seminally, *Artico* v. *Italy*, 13 May 1980, Series A no. 37, para. 33.
42. Seminally, *Tyrer* v. *the United Kingdom*, 25 April 1978, Series A no. 26, para. 31. See also the Preamble of the Convention ('further realisation of human rights'); and Françoise Tulkens, 'Les techniques interprétatives des organes de protection des droits de l'homme: Discutant', *Revue Générale de Droit International Public* 11, no. 2 (2011): 533–40, 534.
43. *Marckx* v. *Belgium*, 13 June 1979, Series A no. 31, para. 31; see, based on a detailed case-law analysis, Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004), 221, 225.
44. Article 31(1) VCLT; *Wemhoff* v. *Germany*, para. 8; *Golder* v. *the United Kingdom*, 21 February 1975, Series A no. 18, paras 34–36. Further, Rietiker, 'The Principle of "Effectiveness"', 252–55.
45. On the distinction between primary and secondary rules, see Eric David, 'Primary and Secondary Rules', in *The Law of International Responsibility* (see note 17), 27–33, 27–29.
46. ARSIWA, with commentaries, para. 1 of the General Commentary ('The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility').
47. Cf. Seibert-Fohr, 'From Complicity to Due Diligence', 677.
48. See *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], paras 21–22 ('capture shock' treatment). On torture and complicity in torture under international law in general, see Nina H. B. Jørgensen, 'Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases', *Chinese Journal of International Law* 16, no. 1 (2017): 11–40, MN 6–13.
49. *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 206 (emphasis added).
50. Ibid., 198.
51. Ibid.
52. Ibid., para. 206. On this standard, see Jørgensen, 'Complicity in Torture', MN 26–32.
53. Cf. André Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?', *EJIL Talk!*, posted 24 December 2012, http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis, observing that the Court's 'acquiescence or connivance' approach does not pertain to the state responsibility framework as set up by the ARSIWA. Critically, Crawford and Keene, 'Structure of State Responsibility', 189.
54. *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 239.
55. Ibid.
56. See ibid., no. 8 (operative part).
57. But see ibid., para. 215: 'the Court must examine whether any responsibility may be *attributed* to the respondent State for having transferred the applicant into the custody of the US authorities' (emphasis added).
58. See ibid., nos 5 and 8 (operative part).
59. Ibid., para. 206.
60. The case dealt with acts committed by 'authorities' of a region not recognised by the international community, the 'Moldavian Republic of Transdniestria'. See *Ilaşcu and Others* v. *Moldova and Russia* [GC], para. 2. Similarly, *Chiragov and Others* v. *Armenia* [GC], no. 13216/05, ECHR 2015.
61. Cf. Nollkaemper, 'On What Basis?'.
62. The attribution of acts of non-state actors to a state is governed by Article 5 (conduct of persons or entities exercising elements of governmental authority) and Article 8 (conduct directed or controlled by a state). See ARSIWA, with commentaries.

63. Ibid., para. 1 on Article 16.
64. See also Seibert-Fohr, 'From Complicity to Due Diligence', 677, her note 47.
65. See Samuel Shepson, 'Jurisdiction in Complicity Cases: Rendition and *Refoulement* in Domestic and International Courts', *Columbia Journal of Transnational Law* 53, no. 3 (2015): 701–51, 725–28; cf. Jørgensen, 'Complicity in Torture', MN 27–32. But cf. Seibert-Fohr, 'From Complicity to Due Diligence', 677, suggesting that '[t]he Court could have analysed the case under Article 16 ARSIWA'.
66. *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 212; cf. Shepson, 'Jurisdiction in Complicity Cases', 725–26. Further, den Heijer, 'Procedural Aspects of Shared Responsibility', 373–75.
67. See ARSIWA, with commentaries, paras 1 and 5 on Article 16; *Monetary Gold Removed from Rome in 1943*, Judgment (preliminary question), I.C.J. Reports 1954, 19, 32. But cf. Jørgensen, 'Complicity in Torture', MN 33–39.
68. ARSIWA, with commentaries, para. 5 on Article 16.
69. *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 218 (emphasis added).
70. Ibid., para. 239.
71. Shepson, 'Jurisdiction in Complicity Cases', 727.
72. ARSIWA, with commentaries, para. 5 on Article 16 (emphasis added).
73. See *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 212; Shepson, 'Jurisdiction in Complicity Cases', 727.
74. See *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 239 *in fine*, where the Court speaks of the *risk* of the transfer.
75. See ibid., nos 5 and 8 (operative part).
76. ARSIWA, with commentaries, para. 1 on Article 16; Shepson, 'Jurisdiction in Complicity Cases', 727.
77. See ARSIWA, with commentaries, para. 10 on Article 16.
78. See Shepson, 'Jurisdiction in Complicity Cases', 727–28. On evidentiary problems, Helen Keller and Corina Heri, 'Enforced Disappearance and the European Court of Human Rights: A "Wall of Silence", Fact-Finding Difficulties and States as "Subversive Objectors"', *Journal of International Criminal Justice* 12, no. 4 (2014): 735–50.
79. ARSIWA, with commentaries, para. 2 on Article 16.
80. See *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], paras 234, 236–37.
81. Ibid., paras 215–22.
82. *Soering* v. *the United Kingdom*, 7 July 1989, Series A no. 161, para. 91. Cf. the similar standard brought to bear in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, I.C.J. Reports 2007, 43, paras 436–38; Jørgensen, 'Complicity in Torture', MN 24–25.
83. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 10 December 1984, 1465 UNTS 85, ratified by 161 states, entered into force 26 June 1987. See CAT, *Agiza* v. *Sweden*, Communication No. 233/2003, views of 20 May 2005, U.N. Doc. CAT/C/34/D/233/2003, para. 13.4.
84. See ARSIWA, with commentaries, paras 1–4 on Part I, Chapter IV; den Heijer, 'Shared Responsibility', 414–16.
85. *Shamayev and Others* v. *Georgia and Russia*, no. 36378/02, ECHR 2005-III; see also *Sharifi and Others* v. *Italy and Greece*, 21 October 2014, no. 16643/09; *M.S.S.* v. *Belgium and Greece* [GC], no. 30696/09, ECHR 2011.
86. See *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 206.
87. See *Jaloud* v. *the Netherlands* [GC], no. 47708/08, ECHR 2014, para. 154; Marko Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court', in *European Convention on Human Rights and General International Law* (see note 6), 97–111, observing that conceptual confusion between jurisdiction and state responsibility is frequent in the Court's case-law.
88. Cf. den Heijer, 'Shared Responsibility', 439.
89. *Sargsyan* v. *Azerbaijan* (merits) [GC], no. 40167/06, ECHR 2015, para. 148 (emphasis added).

90. Ibid., para. 150; see also den Heijer, 'Procedural Aspects of Shared Responsibility', 367–68.
91. *Sargsyan* v. *Azerbaijan* (merits) [GC], para. 150.
92. See ibid., Concurring Opinion of Judge Yudkivaska ('Can anyone exercise authority, in any sense of the word, over heavily mined territory which lies either side of a frontline, surrounded by armed forces from both sides and which, consequently, no one can even enter?').
93. *Sargsyan* v. *Azerbaijan*, para. 151 ('In conclusion, the Court finds that the facts out of which the alleged violations arise are within the "jurisdiction" of Azerbaijan … and are capable of engaging [its] responsibility'); see also Crawford and Keene, 'Structure of State Responsibility', 196.
94. *Sargsyan* v. *Azerbaijan*, paras 241–42; 259–61; 271–74.
95. Cf. Nollkaemper, 'On What Basis?'.
96. HRC, *Alzery* v. *Sweden,* Communication No. 1416/2005, views of 25 October 2006, 88th Sess., U.N. GAOR 62nd Sess., Supp. No. 40, at 331, U.N. Doc. A/62/40 (Vol. II) (2007), para. 11.6 referring to Article 1 CAT.
97. But cf. Jørgensen, 'Complicity in Torture', MN 31.
98. See *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 220 ('by transferring the applicant into the custody of the US authorities, the Macedonian authorities knowingly exposed him to a real risk of ill-treatment') and para. 223 ('the respondent State is to be held *responsible for … his torture at Skopje Airport* and for having transferred the applicant into the custody of the US authorities, thus exposing him to the risk of further treatment contrary to Article 3 of the Convention') (emphasis added).
99. See also Seibert-Fohr, 'From Complicity to Due Diligence', 677 and her note 44. She suggests that the Court would better apply due diligence standards in such cases in order to avoid going overboard in attributing harmful acts.
100. But see *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], no. 8 (operative part).
101. Cf. Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR', *Human Rights Law Review* 18, no. 2 (2018): 309–46, 319 text to and her note 69.
102. *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 239.
103. Nollkaemper, 'On What Basis?'.
104. Crawford and Keene, 'Structure of State Responsibility', 189.
105. Ibid.
106. Generally on the state duty to protect, Susan Carolyn Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (London, New York: Routledge, 2016), 92–121; Olivier de Schutter, *International Human Rights Law*, 2nd ed. (Cambridge: Cambridge University Press, 2014), 441–61; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009), 103–11; Bertrand G. Ramcharan, *The Fundamentals of International Human Rights Treaty Law* (Leiden, Boston: Martinus Nijhoff, 2011), chapter 5.
107. See CAT, *General Comment No. 2: Implementation of Article 2 by States Parties,* 24 January 2008, CAT/C/GC/2, paras 16–18; HRC, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 29 March 2004 (2187th mtg.), CCPR/C/21/Rev.1/Add.13, para. 8 (quoted below, text to note 156); *Velásquez-Rodríguez* v. *Honduras* (merits), 29 July 1988, IACHR Series C No. 4, 28 ILM 291 (1989), paras 164–88; and text to note 96, quoting from *Alzery* v. *Sweden;* cf. *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR)* v. *Nigeria,* No. 155/96, 30th Ordinary Sess. (2001), 2001 AHRLR 60, paras 44–48.
108. *Al Nashiri* v. *Poland,* no. 28761/11, 24 July 2014, para. 517.
109. See ibid., para. 531: 'Poland's responsibility is engaged in respect of both [the applicant's] detention on *its* territory and *his transfer* from Poland' (emphasis added). Cf. Fink, 'ECtHR and State Responsibility', 117–18, on the Court's reaction, in *Al-Jedda* v. *the United Kingdom* [GC], no. 27021/08, ECHR 2011, to the critique of *Behrami and Behrami* v. *France* and *Saramati* v. *France, Germany and Norway* (dec.) [GC], nos 71412/01 and 78166/01, 2 May 2007.

110. There was not the slightest indication of conduct attributable to the FYRM that could have established the FYRM's territorial or personal jurisdiction over the impugned events in Kabul.
111. Evans, 'Role and Realm', 157–59; see also Crawford and Keene, 'Structure of State Responsibility'.
112. On this, see also above, section 2.2.
113. There are more than these two possibilities. In particular, certain cases could raise questions concerning the attribution of omissions by parastatal entities. However, a discussion of all the different constellations is not necessary to make our argument.
114. E.g. teachers are obliged not to whip pupils, while the schooling authority may concurrently be required to issue policies that prohibit teachers from whipping pupils. See also above, text to note 38.
115. See Crawford, *State Responsibility*, 117.
116. Human rights equally entail negative and positive obligations. See Kälin and Künzli, *International Human Rights Protection*, 96. Seminally, Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, *The New International Economic Order and the Protection of Human Rights, Report on the Right to Adequate Food as a Human Right (submitted by Asbjørn Eide, Special Rapporteur)*, 7 July 1987, U.N. Doc. E/CN.4/Sub.2/1987/23, especially paras 111–16; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), especially 51–64.
117. Crawford and Keene, 'Structure of State Responsibility', 183–84; Evans, 'Role and Realm', 157–58.
118. Monica Hakimi, 'State Bystander Responsibility', *European Journal of International Law* 21, no. 2 (2010): 341–85, 353.
119. But cf. below text to note 140.
120. Cf. Benedetto Conforti, 'Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations', in *Issues of State Responsibility* (see note 17), 129–38, 134.
121. On causation between state omission and harm, see Stoyanova, 'State Omission and Harm'.
122. Crawford and Keene, 'Structure of State Responsibility'.
123. *Costello-Roberts* v. *the United Kingdom*, 25 March 1993, Series A no. 247-C, para. 26.
124. See ibid., paras 26–28.
125. U.N. Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, ratified by 196 states, entered into force 2 September 1990.
126. See Committee on the Rights of the Child (CRC), *General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment (Arts. 19; 28, para. 2; and 37, inter alia)*, 2 March 2007, 42nd Sess., CRC/C/GC/8, paras 30–37.
127. Katja S. Ziegler, 'Immunity *versus* Human Rights: The Right to a Remedy after *Benkharbouche*', *Human Rights Law Review* 17, no. 1 (2017): 127–51, 147.
128. Cf. ibid., 146–48.
129. *O'Keeffe* v. *Ireland* [GC], no. 35810/09, ECHR 2014 (extracts).
130. *X and Y* v. *the Netherlands*, 26 March 1985, Series A no. 91.
131. *O'Keeffe* v. *Ireland* [GC], para. 148.
132. See CAT, *General Comment No. 2*, para. 18.
133. *Costello-Roberts* v. *the United Kingdom,* para. 32.
134. Ibid., paras 27–28.
135. *O'Keeffe* v. *Ireland* [GC], para. 152.
136. Ibid., para. 162.
137. Ibid.
138. Of course, this suggestion stands in a certain contrast to the Convention states' discretion on how to comply with their obligations.
139. ARSIWA, with commentaries, para. 2 on Part I, Chapter II.

140. See Stoyanova, 'State Omission and Harm', 318.
141. See *O'Keeffe* v. *Ireland* [GC], paras 162–65.
142. See ibid., para. 151.
143. See ibid., paras 161–62.
144. *El-Masri* v. *the Former Yugoslav Republic of Macedonia* [GC], para. 239.
145. Cf. Conforti, 'Responsibility for Breach of Positive Obligations', 130–35; Hakimi, 'State Bystander', 349–54.
146. Stoyanova, 'State Omission and Harm', 317–18.
147. Cf. Breau, *Responsibility to Protect*, 105.
148. See Seibert-Fohr, 'From Complicity to Due Diligence', 704–05.
149. *O'Keeffe* v. *Ireland* [GC], para. 151.
150. *Costello-Roberts* v. *the United Kingdom,* para. 8 and Joint Partly Dissenting Opinion of Judges Ryssdal, Thór Vilhjálmsson, Matscher and Wildhaber.
151. Cf. Evans, 'Role and Realm', 149–51.
152. One powerful *caveat* is apparent, though: the Court is a judicial authority and not a substitute legislator.
153. *O'Keeffe* v. *Ireland* [GC], para. 168: 'this is not a case which directly concerns the responsibility of L.H. … or, indeed, of any other individual … Rather, the application concerns the responsibility of a State. More precisely, it examines whether the respondent State … adequately protected children, through its legal system'.
154. Ibid., paras 160–69.
155. Ibid., para. 168.
156. HRC, *General Comment No. 31*, para. 8.
157. On the difficulty of establishing government authority over the operations of parastatal entities such as private prisons, see ARSIWA, with commentaries, paras 1–7 on Article 5; Crawford, *State Responsibility*, 129–32.
158. For an example under Article 5 of the Convention, see *Storck* v. *Germany*, no. 61603/00, ECHR 2005-V, paras 102–08.
159. Cf. Stoyanova, 'State Omission and Harm', 316–18.
160. Cf. Andrea Gattini, 'Breach of International Obligations', in *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, ed. André Nollkaemper and Ilias Plakokefalos (Cambridge: Cambridge University Press, 2014), 25–59, 42.

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